

# Appendix A



**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

D.T.C. 09-9

June 30, 2010

TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers

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ORDER

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FOR: TRACFONE WIRELESS, INC.

## I. Introduction

TracFone Wireless, Inc. (“TracFone”) provides SafeLink Wireless® (“SafeLink”) Lifeline services in Massachusetts. Lifeline is a universal service support mechanism designed to provide low-income consumers with discounted monthly telephone service for a single line per residence. *In the Matter of Lifeline and Link-Up*, 19 F.C.C.R. 8302, *Report and Order and Further Notice of Proposed Rulemaking* at 8306-07 (rel. Apr. 29, 2004) (“*Lifeline Order*”). As an eligible telecommunications carrier (“ETC”),<sup>1</sup> TracFone receives federal reimbursements for every qualifying low-income consumer that it provides with Lifeline services under the Low Income Program of the Universal Service Fund<sup>2</sup> (“USF”). 47 C.F.R. §54.407(b).

In order to receive USF reimbursements for its SafeLink Lifeline customers in Massachusetts, TracFone must comply with state procedures to certify and verify the eligibility of its customers. 47 C.F.R. §§54.410 (a)(1), (c)(1). As required under the verification procedures currently in place, TracFone submitted its Annual Audit Report (“Audit Report”) to the Department of Telecommunications and Cable (“Department”). Notice of Filing, Annual Audit Report (“Notice of Filing”). Upon review, the Department finds that the results of the audit indicate TracFone’s current certification and verification procedures are insufficient to ensure that only eligible consumers receive Lifeline services and to prevent fraud. Consequently, the Department concludes that an investigation must be opened to determine whether there are more appropriate certification and verification procedures, and requires TracFone to continue conducting annual verification audits, consistent with the current

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<sup>1</sup> Only carriers designated as ETCs under 47 U.S.C. § 214(e), may receive universal service reimbursement for providing Lifeline services. *Lifeline Order* at 8306.

<sup>2</sup> Administered by the Universal Service Administrative Company (“USAC”).

requirements and the instructions provided in Attachment 1 to this *Order*, pending conclusion of that investigation.

## II. Background and Procedural History

In 2008, the FCC granted TracFone's petition to be designated as an ETC in Massachusetts, as well as in several other states, under certain conditions.<sup>3</sup> *In the Matter of Fed.-State Joint Bd. on Universal Serv., TracFone Wireless, Inc. Petition for Designation as an Eligible Telecomms. Carrier*, 23 F.C.C.R. 6206, *Order* at 6207 (rel. Apr. 11, 2008) ("ETC Designation Order"). Under 47 U.S.C. § 214(e)(2), state commissions have primary responsibility for granting ETC designations. The FCC may perform such designations, upon request, but only for common carriers "not subject to the jurisdiction of a State commission." 47 U.S.C. § 214(e)(6). In granting TracFone's ETC designation petition for Massachusetts, the FCC found that the state commission lacked jurisdiction on the basis of "an affirmative statement from the relevant state commission" submitted by TracFone. *ETC Designation Order* at 6211. This statement that TracFone submitted was a copy of a Department *Order* holding that the Department would no longer regulate the rates, entry into the market, or "other terms and conditions [of CMRS in Massachusetts] such as liability of the company, use of service, and consumer protection issues" effective August 10, 1994. *Investigation by the Dep't of Pub. Utils. upon its own motion on Regulation of Commercial Mobile Radio Serv.*, D.P.U. 94-73 at 2, 12-14 (Aug. 5, 1994) ("CMRS Order"). In written comments to the FCC, the Department has firmly

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<sup>3</sup> Prior to this *Order*, the FCC granted TracFone forbearance from the requirement for ETC designation that carriers must provide Lifeline service, at least in part, over its own facilities for Lifeline support only. *In the Matter of Fed.-State Joint Bd. on Universal Serv., Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 F.C.C.R. 15095, *Order* at 15095 (rel. Sept. 8, 2005) ("Forbearance Order"). As a pure wireless reseller or reseller of Commercial Mobile Radio Service ("CMRS"), TracFone does not provide Lifeline service over its own facilities. *Id.* The FCC conditioned that forbearance on TracFone, *inter alia*, "requiring its customers to self-certify at time of service activation and annually thereafter that they are the head of household and receive Lifeline-supported service only from TracFone; and (f) establishing safeguards to prevent its customers from receiving multiple TracFone Lifeline subsidies at the same address." *Id.* at 15098-99.

rejected the notion that the *CMRS Order* constitutes an affirmative statement declining jurisdiction and has since expressly asserted jurisdiction over ETC designations for wireless carriers.<sup>4</sup>

ETCs are eligible to “receive universal service support reimbursement for each qualifying low-income consumer” that they serve. 47 C.F.R. § 54.407(b). Federal regulations provide that state commissions in non-federal default states,<sup>5</sup> such as Massachusetts, who have opted to establish their own requirements, “shall establish narrowly targeted qualifications criteria that are based solely on income or factors directly related to income.” *Id.* at § 54.409(a). Consumers must meet these eligibility criteria in order to receive Lifeline service. *Id.* ETCs in non-federal default states must comply with state certification procedures to document consumer income-based eligibility for Lifeline prior to enrollment and they must also comply with state verification procedures to verify continued eligibility of their subscribers. *Id.* at §§ 54.410(a)(1), (c)(1).

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<sup>4</sup> The FCC has held:

While a carrier may believe state law to preclude the state commission from exercising jurisdiction over the carrier for purposes of designation under section 214(e)(2), we conclude, as a matter of federal-state comity, that the carrier should first consult with the state commission to give the state commission an opportunity to interpret state law. We conclude that state commissions should be allowed a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers.

*In the Matter of Fed.-State Joint Bd. on Universal Serv.; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Petitions for Designation as an Eligible Telecomms. Carrier and for Related Waivers to Provide Universal Serv.*, 15, F.C.C.R. 12208, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking* at 12264 (rel. June 30, 2000) (“*Universal Service Order*”). This Department has stated that the “scope of the *CMRS Order* never was intended to reach matters involving the USF or ETC designation.” *In the Matter of Fed.-State Bd. on Universal Serv., Virgin Mobile USA, L.P., Petition for Limited Designation as an Eligible Telecomms. Carrier in the Commonwealth of Mass.*, CC Docket No. 96-45, Comments of the Mass. Dep’t of Telecomms. and Cable at 5-6 (filed Aug. 21, 2008) (*italics added*) (noting that, *inter alia*, at the time of the *CMRS Order*, CMRS providers were not eligible to receive funding from the USF and that the Department has not since interpreted that *Order* to suggest that it does not have jurisdiction over wireless ETC designations.)

<sup>5</sup> Federal default states are those that have not adopted their own certification and verification procedures, or have opted to follow the federal requirements. *Lifeline Order* at 8307.

Certification and verification requirements are designed to prevent fraud and abuse and “ensure that the low-income support mechanism is updated, accurate, and carefully targeted to provide support only to eligible consumers.” *Lifeline Order* at 8319, 8322.

As a non-federal default state, Massachusetts sets its own procedures for certification and verification of the eligibility of Lifeline customers. Exh. D.T.C. 4. In Massachusetts, Lifeline customer eligibility is based on participation in one or more of the following programs:

Emergency Aid to the Elderly, Disabled and Children (“EAEDC”), Fuel Assistance (Low Income Home Energy Assistance Program or “LIHEAP”), MassHealth or Medicaid, Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), Supplemental Security Income (SSI), Transitional Aid to Families with Dependent Children (“TAFDC”). Massachusetts Application for Lifeline/Link Up Telephone Service, *available at* [http://www.mass.gov/Eoca/docs/dtc/Consumer/lifeline\\_app2010.pdf](http://www.mass.gov/Eoca/docs/dtc/Consumer/lifeline_app2010.pdf) (last visited Mar. 26, 2010) (“Mass. Lifeline Application”).

The Department granted TracFone a waiver of the existing Lifeline certification and verification processes in Massachusetts.<sup>6</sup> Exh. D.T.C. 4. The certification and verification requirements applicable to TracFone in Massachusetts are documented in a series of letters from the Department to TracFone’s counsel.<sup>7</sup> Specifically, the Department permits TracFone to use a

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<sup>6</sup> The certification and verification procedures currently in place in Massachusetts vary depending upon the program establishing eligibility. Comments of Verizon Mass., D.T.E. 01-106 at 6-9 (Jan. 24, 2002). Generally, the ETC verifies each customer’s eligibility prior to enrollment, either via program participant lists provided by the applicable state assistance agency, or via agency confirmation of an applicant’s status. *See id.* Once the customer’s eligibility is confirmed, the ETC enrolls the customer in the Lifeline program. *Id.* at 7. ETCs credit the customer’s account with a discount calculated back to the date of the Lifeline application. *Id.* ETCs annually verify each of its Lifeline subscribers in one of two ways. For subscribers participating in certain programs, the ETC provides the administering state agency with a list of its Lifeline subscribers for verification by that agency. *Id.* at 9. For recipients eligible based on participation in Fuel Assistance, ETCs annually receive a list of former Fuel Assistance recipients and remove those subscribers unless they can prove they receive another type of low-income assistance establishing eligibility. *Id.*

<sup>7</sup> Exh. D.T.C. 4; Exh. TracFone 1; Exh. TracFone 2.

self-certification process to sign up customers, using its existing application form.<sup>8</sup> Exh.

TracFone 1. Additionally, the Department allows TracFone to conduct an annual audit of a random, statistically-valid sample of its customers to verify subscriber eligibility, consistent with the FCC's annual audit requirement. *Lifeline Order* at Appendix J; Exh. TracFone 1. This "audit is intended to ensure that the self-certification process used by TracFone to enroll customers is working as intended to prevent fraud and abuse among customers." Exh. D.T.C. 4. The Department set a filing deadline for the first annual audit report of August 31, 2009, with subsequent audit reports due annually by August 31. Exh. TracFone 2. TracFone was required to consult the Department prior to the first annual audit to confirm the details of the audit, including sample size.<sup>9</sup> Exh. TracFone 2. When TracFone neither filed its audit, nor contacted the Department, the Department sent TracFone a letter on November 2, 2009 directing TracFone to "submit a detailed plan for its first audit by November 16, 2009, for Department review and approval." Exh. D.T.C. 4.

On November 18, 2009, TracFone filed a report on its audit of a random, statistically-valid sample of its SafeLink subscribers with the Department for the purpose of verifying the eligibility of its subscribers. Notice of Filing. TracFone filed a Motion for Protective Order with the audit, seeking to prevent public disclosure of all of the information it files in this proceeding, as well as all information filed with its Notice of Filing. Motion for Protective Order at 2 ("Motion"). Notice of the public hearing was provided in accordance with 220 C.M.R. § 1.06(5), and TracFone submitted proof of publication to the Department on January 25, 2010.

On February 3, 2010, the Department conducted a public hearing and procedural conference in

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<sup>8</sup> The Department reserved the right to later require TracFone to modify its application form to collect additional information to facilitate the audit verification process. Exh. TracFone 1.

<sup>9</sup> The Department noted that the "specific elements of the audit process will be worked out between TracFone and the Department" and that "a larger sample size" may be required. Exh. TracFone 1.

this matter. On February 9, 2010, the Hearing Officer in this proceeding issued a *Ruling* denying the Motion for Protective Order and ordering TracFone to submit a copy of the audit, redacted to remove personal subscriber information.<sup>10</sup> *TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers*, D.T.C. 09-9, *Hearing Officer Ruling on Motion for Protective Treatment by TracFone Wireless, Inc. Regarding Annual Audit of SafeLink Wireless Lifeline Customers* (Feb. 9, 2010). TracFone filed an Appeal of that *Ruling* on February 18, 2010. Appeal of Ruling. On March 5, 2010, the Department issued an *Order*, granting TracFone's appeal with respect to the internal policies and procedures contained in Attachments 5 and 6 and denying the appeal with respect to the subscriber totals, audit sample size, and audit results contained in Attachments 1, 2, and 3. *TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers*, D.T.C. 09-9, *Order on Appeal of Hearing Officer Ruling on Motion for Protective Treatment* (Mar. 5, 2010) ("Order on Appeal").

TracFone submitted its responses to the Department's first set of Information Requests on March 3, 2010.<sup>11</sup> The Department issued its Second Set of Information Requests on March 16, 2010 and TracFone filed its responses on March 30, 2010. Docket. The Department held an evidentiary hearing in this matter on April 13, 2010. On May 14, 2010, TracFone filed responses to the Department's Record Requests, issued during the April 13<sup>th</sup> hearing, along with

<sup>10</sup> TracFone filed a Motion for Extension of Time to file the redacted audit as well as to file an appeal of the *Hearing Officer Ruling*. *TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers*, D.T.C. 09-9, *Hearing Officer's Ruling on Motion of TracFone Wireless, Inc. for Extension of Time to File Redacted Documents and to File Appeal* (Feb. 11, 2010). The Department granted the Motion for Extension of Time on February 11, 2010. *Id.*

<sup>11</sup> Along with the responses, TracFone submitted a Motion for Protective Order seeking confidential treatment for its responses to Information Requests D.T.C. 1-8, D.T.C. 1-12, D.T.C. 1-28(C), D.T.C. 1-28(D), D.T.C. 1-30, D.T.C. 1-31, and D.T.C. 1-32, including the attached Exhibits 1-28(C) and 1-32. Motion for Protective Order; TracFone Wireless, Inc.'s Responses to First Set of Information Requests of the Department of Telecommunications and Cable. The Department granted this motion with respect to the responses to D.T.C. 1-30, D.T.C. 1-31, and D.T.C. 1-32 and as well as Exhibit D.T.C. 1-28(C) and Exhibit D.T.C. 1-32, and denied it with respect to the responses to D.T.C. 1-8, D.T.C. 1-12, D.T.C. 1-28(C), and D.T.C. 1-28(D). *TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers*, D.T.C. 09-9, *Hearing Officer Ruling on Motion for Protective Treatment* (Mar. 16, 2010).



a motion for confidential treatment for its responses to Record Requests 2, 15(A), 15(D), 15(G), and 16(A)-(C). Motion for Protective Order (“Motion”); TracFone Wireless, Inc.’s Responses to Record Requests of the Department of Telecommunications and Cable. Lastly, on June 14, 2010, TracFone filed its Brief, along with a revised Attachment 3 to its Audit Report. Brief.

### III. Motion for Protective Treatment

All documents and data received by an agency of the Commonwealth are public records and, therefore, must be made available for public review under a general statutory mandate, unless subject to specified exemptions. *See* G. L. c. 66, § 10; G. L. c. 4, § 7(26). “Public records” include “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose unless such materials or data fall within [certain enumerated] exemptions.” G. L. c. 4, § 7(26). Materials that are “specifically or by necessary implication exempted from disclosure by statute” are excluded from the definition of “public records.” G. L. c. 4, § 7(26)(a).

G. L. c. 25C, § 5 permits the Department to “protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter.” In applying this exception, there is a presumption that “the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection.” G. L. c. 25C, § 5.

Under this provision, the Department applies a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department

proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information.” *Id.* Second, the party seeking protection must overcome the statutory presumption that all such information is public information by “proving” the need for its non-disclosure. *See* G. L. c. 66, § 10. Third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. *See* G. L. c. 25C, § 5.

a. Response to D.T.C. R.R. 2 and D.T.C. R.R. 16(A)-16(C): Subscriber Information

TracFone’s responses to several of the Department’s Record Requests consist of subscriber statistics. Specifically, TracFone’s response to the Department’s Record Request 2 reveals the number of customers who failed to self-certify that they are the head of household and only receive Lifeline service from TracFone. Motion at 2-3. TracFone’s responses to Record Requests 16(A)-16(C) include the average additional minutes purchased by Massachusetts SafeLink subscribers; the percentage of customers who voluntarily discontinued service in 2009; and the percentage of customers who were de-enrolled for any reason in 2009. Motion at 4-5. TracFone asserts that such subscriber statistics are highly confidential and competitively sensitive because disclosure would permit competitors to determine whether and how to compete in this market. Motion at 4-5. For the reasons below, TracFone’s motion as to its responses to Record Requests 2, and 16(A)-16(C) is allowed.

First, the Department examines whether each response is confidential and competitively sensitive as TracFone contends. G. L. c. 25C, § 5. Here, the Department finds that the subscriber statistics and financial information in these responses constitute competitively sensitive data, kept confidential by TracFone. *See* Motion at 3, 5.

Under the second requirement of G. L. c. 25C, § 5, to show that the necessity for non-disclosure overcomes the statutory presumption that the information is public, the party seeking confidential treatment must adequately justify a need for such treatment. *See* G. L. c. 25C, § 5. The Department notes that, as customers who fail to complete the self-certification must be de-enrolled, disclosure of this response would provide competitors with specific customer loss data which its competitors could use to gain an advantage. *See* Motion at 3. Also, disclosure of statistics regarding customer de-enrollment and the purchase of additional minutes may similarly benefit TracFone's competitors. *See id.* at 5. Accordingly, the Department agrees that these responses are competitively sensitive to TracFone as they reflect specific customer trends, and thus TracFone satisfies the requirement that protective treatment is warranted.

Finally, the third part of the standard applied under G. L. c. 25C, § 5 requires that only so much protection be afforded as necessary to meet the proven need. Here, TracFone seeks confidential treatment only for the portions of the responses that contain the competitively sensitive data. *See, e.g.,* Motion at 3 (seeking confidential treatment for the number of customers who failed to self-certify, but not for the section of the response describing TracFone's follow-up procedures). Accordingly the Department finds that TracFone has satisfied its burden to show that the responses to Record Requests 2, and 16(A)-16(C) warrant confidential treatment.

b. Responses to D.T.C. R.R. 15(A) and D.T.C. R.R. 15(G): Revenue

TracFone's responses to the Department's Record Requests 15(A) and 15(G) provide internal financial information regarding revenues in Massachusetts. TracFone's response to Record Request 15 is the annual revenue for 2009 from TracFone's SafeLink service in Massachusetts. Motion at 4. The response to Record Request 15(G) is the average revenue per SafeLink customer in Massachusetts. Motion at 4. TracFone asserts that these responses

constitute internal financial data that is confidential to TracFone. Motion at 4. The Department agrees that such financial data is competitively sensitive information warranting protective treatment pursuant to G. L. c. 25C, §5. *See Complaint of Choice One Comm'cns of Mass. Inc., Conversent Comm'cns of Mass., LLC, CTC Comm'cns Corp., and Lightship Telecom, LLC (collectively, One Communications), Concerning Alleged Unlawful Charges Imposed by Verizon New England Inc., d/b/a Verizon Mass. for Access Toll Connecting Trunk Ports and E911/911 Dedicated End Office Trunk Ports*, D.T.C. 08-3, *Order* at 11 (Apr. 9, 2009) (citing *Hearing Officer Ruling*, D.T.E. 01-31 Phase I, at 4 (Aug. 29, 2001) (proprietary financial information granted confidential treatment)).

As none of the information provided has been publicly disclosed, and all of the information contained in these responses is competitively sensitive, the Department finds that the second and third prongs of the test have been satisfied. G. L. c. 25C, § 5. Accordingly the Department grants TracFone's motion relating to its responses to Record Requests 15(A) and 15(G).

c. Response to D.T.C. R.R. 15(D): USAC Refunds

Record Request 15(D) asks TracFone to disclose the amount of TracFone's USAC refunds in 2009. TracFone seeks to protect its response to this record request and argues that "while the total amount of money received by an ETC from USAC is publically available, that number does not disclose how much money, if any, was returned by an ETC to USAC during a particular year." Motion at 4. Simply because information is not publicly available is not determinative of whether it warrants confidential treatment. *See* G. L. c. 25C, § 5 (requiring that the proponent show a need for protective treatment). Here, the Department finds that TracFone

fails to satisfy the requirements of G. L. c. 25C, § 5, and therefore, the request to protect its response to Record Request 15(D) is denied.

With respect to the first requirement of G. L. c. 25C, § 5, TracFone has not convinced the Department that the amount of refunds made to USAC constitutes competitively sensitive information. The Department does not recognize a risk of competitive harm from disclosure of the refund data. Numerous factors may impact a refund calculation, including the refund period, number of subscribers, and what tier or tiers of support are subject to the refund. Accordingly, the Department does not believe that competitors could glean any competitively sensitive data from refund figures alone.

Furthermore, TracFone has not satisfied the second requirement of G. L. c. 25C, § 5. To satisfy the second requirement of G. L. c. 25C, § 5, TracFone must show that the necessity for non-disclosure overcomes the statutory presumption that the information is public. *See* G. L. c. 25C, § 5. The Department has held that “[i]n determining the existence and extent of such a need, the Department must consider the presumption in favor of disclosure and the specific reasons that disclosure of the information benefits the public interest.” *Petition of Cambridge Elec. Light Co., Commonwealth Elec. Co., and Canal Elec. Co. pursuant to G. L. c. 164, §§ 1, 76, 94 and 220 C.M.R. § 1.00 et seq. for review of their elec. industry restructuring proposal*, D.P.U./D.T.E. 97-111 at 10 (Feb. 27, 1998) (citing *Investigation by the Dep’t on its own motion of the petitions of The Berkshire Gas Co., Colonial Gas Co., Essex County Gas Co. and Fitchburg Gas and Elec. Light Co. for approval of gas supply agreements, pursuant to G. L. c. 164, § 94A, executed independently between each of the petitioners and certain gas mktg. and supply cos.*, D.P.U. 93-187/188/189/190, *Order on Standard of Review and Confidentiality* at 16

(Jan. 19, 1994)). This prong of the test balances the proponent's need for confidential treatment against the public interest in disclosure. *See id.*

Here, TracFone fails to assert a need for protective treatment, by failing to specify how, if at all, disclosure of its refunds to USAC could result in harm. As explained above, the Department does not recognize a risk of competitive harm from disclosure of the refund data. In contrast, the Department finds that the public interest in disclosure of USAC refund data is significant. Any refunds returned to USAC are directly related to TracFone's receipt of federal Lifeline subsidies. *See* 47 C.F.R. §§ 54.407, 54.410(c); Exh. D.T.C. 4. The Department recognized the considerable public interest in ensuring that government benefit programs are properly and effectively administered in the *Order on Appeal*, issued in this proceeding. *Order on Appeal* at 11-12 (citing *Commonwealth v. Kobrin*, 395 Mass. 284, 293-94 (1985); *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (1979) (in balancing the public's interest in disclosure against the privacy rights of tax delinquents, the court recognized that "the public right to know whether the burden of public expenses is equitably distributed, and whether public employees are diligently collecting delinquent accounts" outweighed any invasion of privacy resulting from disclosure of delinquent tax records)). Additionally, G. L. c. 4, § 7(26)(g), which excludes from the definition of public records "trade secrets or commercial or financial information voluntarily provided to an agency" for use in developing policy, but explicitly excludes from this exemption "information submitted as required by law or as a condition of receiving a governmental contract or other benefit." This categorical exclusion from a public records exemption of information submitted in order to receive "a governmental contract or other benefit" highlights the public interest in disclosure of this exact type of information. G. L. c. 4, § 7(26)(g). As TracFone failed to present an argument as to how disclosure of refund data would

result in harm, TracFone fails to prove a need for protective treatment. Accordingly, the public interest in disclosure far outweighs TracFone's interest in keeping this information confidential and the Department finds that protective treatment of TracFone's response to Record Request 15(D) is not warranted.

#### IV. Analysis and Findings: Annual Verification Audit

As an initial matter, the Department finds that TracFone complied with the eligibility verification requirements currently in place, by surveying a random, statistically-valid sample of its customers, consistent with the FCC's annual audit requirement. *Lifeline Order* at Appendix J; Exh. TracFone 1.

The results of the audit indicate that TracFone successfully verified 22 subscribers out of the 43<sup>12</sup> sampled for a verification rate of 51%. Audit Report at Attachment 1. The remaining 21 subscribers surveyed were deemed ineligible. Brief at 8. The Department finds that the rate of ineligible customers, at 49%, is unacceptably high and raises considerable concern. As the audit indicates such a high number of potential ineligible SafeLink subscribers receiving Lifeline benefits in Massachusetts, the Department finds that the current certification and verification procedures are insufficient to ensure that only eligible subscribers receive Lifeline benefits and to prevent fraud.

The Department notes that many of the subscribers deemed ineligible in the audit were due to a lack of response. Audit Report at Attachment 3. As TracFone has recognized, receiving requested responses from customers has been an ongoing problem. *In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc.*, CC Docket No. 96-45,

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<sup>12</sup> TracFone correctly calculated a sample size of 43 for its first annual audit using the FCC's guidelines. *Lifeline Order* at Appendix J.

Supplement to Petition for Modification of Annual Verification Condition (June 1, 2009) (“Supplement to Modification Petition”). In a supplementary filing to a Petition before the FCC<sup>13</sup>, TracFone states that “on average only 15 percent of its customers who receive a direct mailing requesting a response actually send a response.” Supplement to Modification Petition at 3. Here, even though TracFone used multiple methods, including direct mailing, as well as electronic mail, text messages, and voicemail to contact its customers for this audit, the response rate was unsatisfactory. Audit Report at Attachment 1.

The audit report also indicated that at least one subscriber was receiving Lifeline from both TracFone and another provider at the time she was contacted for the audit. Audit Report at Attachment 3 (“customer called to cancel service because she has lifeline at home”). Three additional subscribers were ineligible because “they fraudulently identified participation in a qualified program on the Lifeline application or were no longer participating in a qualified program.” Brief at 8; Audit Report at Attachment 3 (revised). The purpose of this audit is not just to ensure that only eligible consumers are receiving Lifeline services, but also to prevent fraud. As the FCC recognized, there is a risk of double-dipping when eligible subscribers receive multiple Lifeline services. *Forbearance Order* at 15103. The FCC imposed additional requirements on TracFone specifically in order to protect against this risk. *See id.* The Department finds that safeguards are needed to ensure that eligible customers do not enroll in duplicate Lifeline services.

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<sup>13</sup> In that Petition, TracFone asks the FCC to modify the condition of the *Forbearance Order* that TracFone annually verify with each customer that the customer is head of household and only receives Lifeline service from TracFone. Supplement at 4.



V. Subsequent Investigation

Consistent with our findings above, the Department finds that the annual subscriber verification audit revealed issues with Lifeline customer eligibility, as well as the certification and verification procedures currently in place, which warrant an investigation to establish appropriate certification and verification procedures for TracFone. In addition, such an investigation will allow the Department to review and consider possible changes to the certification and verification procedures of other ETCs in Massachusetts, which have not been examined for many years. Moreover, it is appropriate to consider the question of whether all ETCs should use the same procedures.

The plain language of the statute grants the Department broad authority to open an investigation solely upon its own initiative. G. L. c. 159, § 16. The Department will conduct the investigation to establish Lifeline certification and verification procedures as an adjudicatory proceeding, as defined in G. L. c. 30A, § 1(1). Parties will be allowed to present legal and factual evidence to support their positions, although the exact procedure will be determined at a procedural conference. The Department will hold public hearings to hear from members of the public and town officials, as set forth in the legal notice to be published shortly.

Prior to the conclusion of that investigation, TracFone shall continue performing annual verification audits, consistent with the audit performed this year, using a random, statistically-valid sample of its SafeLink subscribers, calculated using the formula provided in Appendix J to the *Lifeline Order*. TracFone must submit the results of its next audit to the Department by August 31, 2010, consistent with the current audit report requirements and the instructions provided in Attachment 1.

VI. Order

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That TracFone's request for confidential treatment is GRANTED IN PART AND DENIED IN PART as set forth above; and it is

FURTHER ORDERED: That TracFone conduct an annual verification audit, using a random, statistically-valid sample of subscribers, consistent with the current requirements, and submit the audit results to the Department by August 31, 2010; and

FURTHER ORDERED: That TracFone submit an audit report, consistent with the audit report submitted in this proceeding, amended according to the instructions provided in Attachment 1 to this *Order*; and

FURTHER VOTES: To open an investigation, docketed D.T.C. 10-3, to establish the appropriate certification and verification procedures to ensure that only eligible subscribers receive Lifeline benefits in Massachusetts, pursuant to G. L. c. 159, § 16. The specific issues and scope of that investigation will be determined at the outset of that proceeding, consistent with notice requirements and due process.

By Order of the Department

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Geoffrey G. Why  
Commissioner

### RIGHT OF APPEAL

Appeals of any final decision, order or ruling of the Department of Telecommunications and Cable may be brought pursuant to applicable federal and state laws.

## **Attachment 1**

### **Additional Audit Report Instructions**

1. Submit a detailed report of each audited subscriber, listed by subscriber identification number, consistent with that submitted as a part of Attachment 3 to the previous Audit Report, and additionally classify each subscriber by “reason” for de-enrollment, specifically:
  - a. No response: subscriber did not respond at all.
  - b. Incomplete response: subscriber responded in some way – for instance, subscriber provided an incomplete response by mailing back the audit form but failed to provide documentation of program participation.
  - c. Duplicate service: subscribers indicated they were receiving services from another ETC.
  - d. De-enroll: subscriber cancelled service. Not applicable for subscribers who fit into another category.
  - e. Fraud: subscriber mistakenly/fraudulently enrolled.
  - f. No longer eligible: subscriber indicated that they had become ineligible at some point after enrollment.
2. Continue to indicate the initial enrollment method for each subscriber.
3. Complete the Annual Lifeline Certification and Verification form, including columns A through E, and submit to both the Department and to USAC. *Available at* [http://www.usac.org/\\_res/documents/li/pdf/Annual-Lifeline-Certification-Verification-letter-for-OMB-and-USAC.pdf](http://www.usac.org/_res/documents/li/pdf/Annual-Lifeline-Certification-Verification-letter-for-OMB-and-USAC.pdf).